2002

State of Utah v. Johhny Harris : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. JOHNNY HARRIS, Defendant/Appellant.	Case No. 20020025-CA

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION FOR POSSESSION OF A STOLEN MOTOR VEHICLE, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 41-1a-1316(2) (1998), IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE J. DENNIS FREDERICK PRESIDING

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ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction for possession of a stolen motor vehicle, a second degree felony, in violation of Utah Code Ann. § 41-1a-1316(2) (1998). This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(e) (Supp. 2001).

STATEMENT OF ISSUE PRESENTED ON APPEAL AND STANDARD OF APPELLATE REVIEW

Issue: Was eyewitness testimony identifying defendant as the driver of a stolen Kia combined with evidence that defendant and a passenger were found out of breath nearby minutes after the Kia was stopped sufficient to support defendant's conviction for possession of a stolen motor vehicle?

Standard of Review: A jury verdict will be reversed for insufficient evidence only when, "after viewing the evidence and all inferences drawn therefrom in a light most

favorable to the jury's verdict, the evidence 'is sufficiently inconclusive or inherently improbable such that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime for which he or she was convicted.'" *State v. Holgate*, 2000 UT 74, ¶ 18, 10 P.3d 346 (citation omitted).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah Code Ann. § 41-1a-1316(2) (1998) provides:

> It is a second degree felony for a person:
> . . .
> (2) to have in his possession any motor vehicle, trailer, or semitrailer that he knows or has reason to believe has been stolen or unlawfully taken if he is not a peace officer engaged at the time in the performance of his duty.

STATEMENT OF THE CASE

Defendant was charged by information with possession of a stolen motor vehicle, a second degree felony, in violation of Utah Code Ann. § 41-1a-1316(2) (1998) (R. 3-5). A jury convicted defendant as charged (R. 75; 100:103-04). The trial court sentenced defendant to a statutory indeterminate prison term of one to fifteen years (R. 79-81). That sentence was suspended, and defendant was placed on probation (R. 79-81). Defendant timely appealed (R. 83-84).

STATEMENT OF THE FACTS[1]

On the evening of August 25, 2001, Officer David Malley had just arrested and placed an individual in the back of his police car at 300 South and West Temple, when he

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[1]The facts are recited in a light most favorable to the jury's verdict. *See State v. Litherland*, 2000 UT 76, ¶ 2, 12 P.3d 92

noticed a green Kia quickly swerving through traffic without its lights on (R. 100:20-22). Recognizing a safety violation, Officer Malley activated his emergency lights (R. 100:22). As he did, the Kia quickly turned down an alley ending in a parking lot at 200 West and Pierpont Avenue (R.100:22, 24-25). Malley pursued the Kia into the alley (R. 100:22). When the Kia reached the parking lot, the Kia braked abruptly and all four car doors opened (R. 100:22-23). Three of the people in the car took off running; the fourth remained by the Kia, where he was detained by Malley (R. 100:23, 25, 26).

The driver of the Kia, a darker-skinned male wearing a white shirt, took off immediately to the west (R. 100:25-26, 27). The passenger behind him, who was wearing a grey shirt, hesitated for a moment and then ran in the same direction as the driver (R. 100:25-26). The passenger in the right-side back seat took off to the north (R. 100:25).

Officer Malley immediately radioed dispatch, related the event, and issued a description of the occupants and their direction of flight (R. 100:26). He then checked the Kia's vehicle identification number and confirmed that the car was stolen (R. 100:26).

Officer Steve Cutler was driving to work near Officer Malley's location when he heard the description of the suspects on the radio (R. 100:47-48). He immediately began looking for individuals that fit that description (R. 100:48). Almost instantly, Cutler noticed two males who fit the description about a block and a half from Malley's location (R. 100:49, 51). When Cutler stopped to talk with them, he noticed that both males were breathing hard and sweating (R. 100:49, 50). After Cutler informed Malley that he had

detained two people, Malley drove to Cutler's location to see if he could identify them (R. 100:28). Malley recognized Andy Rasabout, the male who had been sitting behind the driver, "instantly" (R. 100:28). He was "80 to 85 percent" sure the other male, defendant, was the driver (R. 100:29). Upon questioning, Mr. Rasabout confirmed that defendant was the driver (R. 100:12, 13).

ARGUMENT SUMMARY

Defendant raises a sufficiency of the evidence claim on appeal. However, defendant does not claim there was insufficient evidence in the record to support his conviction. Rather, he claims that the jury should not have relied on that evidence. Specifically, defendant claims that the jury should not have believed Andy Rasabout because inconsistencies in his testimony and his fear of being charged rendered him not credible. He claims that the jury should not have believed Officer Malley because he could not identify defendant with one-hundred percent certainty. Because it is the sole province of the jury to determine the credibility of witnesses and the weight of their testimony, defendant's claim fails.

ARGUMENT

EYEWITNESS TESTIMONY IDENTIFYING DEFENDANT AS THE DRIVER OF THE STOLEN KIA COMBINED WITH EVIDENCE THAT DEFENDANT AND A PASSENGER WERE FOUND OUT OF BREATH NEARBY MINUTES AFTER THE KIA WAS STOPPED WAS SUFFICIENT TO SUPPORT DEFENDANT'S CONVICTION FOR POSSESSION OF A STOLEN MOTOR VEHICLE

Defendant claims that the jury should not have convicted him of possession of a stolen motor vehicle because the evidence supporting his conviction was unreliable. Br. of Aplt. at 8-14. Defendant's claim lacks merit.

"[A] defendant must overcome a heavy burden in challenging the sufficiency of evidence for a jury verdict." *State v. Gonzales*, 2000 UT App 136, ¶ 10, 2 P.3d 954. "[This Court] will reverse a jury verdict only when, after viewing the evidence and all inferences drawn therefrom in a light most favorable to the verdict, [it] find[s] that the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust." *State v. Silva,* 2000 UT App 292, ¶ 13, 13 P.3d 604 (internal quotations and citations omitted). "So long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, [this Court's] inquiry stops." *State v. Booker,* 709 P.2d 342, 345 (Utah 1985).

Section 41-1a-1316(2) provides that any person who "[has] in his possession any motor vehicle . . . that he knows or has reason to believe has been stolen or unlawfully taken" is guilty of possession of a stolen motor vehicle. Utah Code Ann. § 41-1a-1316(2) (1998).

On appeal, defendant does not deny that he knew or had reason to believe that the green Kia was stolen. *See* Br. of Aplt. at 8-14. Rather, he challenges only the jury's finding that he possessed the Kia, i.e., that he was the driver.

The record evidence supports defendant's conviction. The following evidence supports the jury's finding: On August 25, 2001, Officer David Malley attempted to stop a green Kia for a safety violation (R. 100:20-22). As the car stopped, Malley saw a dark-skinned male with a white shirt exit the driver's door and run west (R. 100:25-26, 27). He saw a male wearing a grey shirt exit the back door on the driver's side and also run west (R. 100:25-26). Malley immediately radioed dispatch and provided a description of the occupants and their direction of flight (R. 100:26). Minutes later, Officer Steve Cutler detained two males about a block and a half away who matched Malley's description (R. 100:48, 49, 51). Cutler noticed that both males were breathing hard and sweating (R. 100:49, 50). Malley recognized one of those persons, Andy Rasabout, "instantly" as the male who had exited the Kia from the back door on the driver's side (R. 100:28). Malley was "80 to 85 percent" sure---"pretty certain but not absolutely certain"---the other person, defendant, was the person he saw driving the Kia (R. 100:29). Andy Rasabout admitted he was a passenger in the Kia and told police that defendant was the driver (R. 100:12, 13). At trial, Rasabout gave the same testimony (R. 100:12-13).

This evidence---the two eyewitness identifications combined with the fact that defendant was found with a passenger "breathing hard" and sweating within minutes of the Kia's being abandoned---is sufficient to support defendant's conviction. *See, e.g.*,

State v. McCullar, 674 P.2d 117, 118-19 (Utah 1983) (affirming conviction based on accomplices testimony even though victims "could not testify that they were entirely certain that defendant was one of the men who robbed them").

Defendant argues, however, that the jury should not have relied on some of this evidence. Specifically, defendant claims that the jury should not have believed Andy Rasabout because inconsistencies in his testimony and his fear of being charged rendered him not credible. He claims that the jury should not have believed Officer Malley because he could not identify defendant with one-hundred percent certainty. Defendant's contentions lack merit.

It was the sole province of the jury to determine the weight of Andy Rasabout's testimony. Defendant claims the jury should not have relied on this evidence because Andy initially "lied to the police about knowing" another passenger in the car that night, because he gave slightly varying stories concerning what happened that night, because he said he was in the car longer than it should have taken to get where he was going, because he "had particular incentive to lie . . . to please his older friends and to protect himself from retribution," and because his testimony was "given in exchange for favorable treatment by the prosecution." Aplt. Br. at 9-11. None of these contentions render Rasabout's testimony insufficient to support defendant's conviction.

First, "[a]lleged inconsistencies . . . simply go to the weight of the testimony and are factual questions for the jury to determine." *State v. Goddard*, 871 P.2d 540, 544 (Utah 1994). Second, defendant's conviction "could be had solely on the testimony of

[an accomplice,] if the jury determined the testimony to be credible" even if such testimony is "'self contradictory, uncertain or improbable.'" *State v. Smith*, 706 P.2d 1052, 1055 & n.3 (Utah 1985) (quoting Utah Code Ann. § 77-17-7(2)); *see also State v. Pacheco*, 13 Utah 2d 148, 369 P.2d 494, 496 (Utah 1962) (holding witness's possible connection to crime "[n]either . . . disqualified him as a witness as to what the defendant did, nor rendered his testimony incompetent," but rather "only affected its credibility"); Utah Code Ann. § 77-17-7(1) (1999) ("A conviction may be had on the uncorroborated testimony of an accomplice.").

As defendant's cases explain, a witness's testimony is rarely without flaws. The issue is whether the defendant was given the opportunity to explore those flaws on cross-examination, thereby "permit[ing] the jury . . . to observe the demeanor of the witness making his statement, thus aiding the jury in assessing his credibility." *Lee v. Illinois*, 476 U.S. 530, 540-41 (1986) (holding defendant's right to confrontation "is uniquely threatened when an accomplice's confession is sought to be introduced . . . without the benefit of cross-examination" because of co-defendant's "strong motivation to implicate the defendant and to exonerate himself"); *see also Delaware v. Van Arsdall*, 475 U.S. 673, 677 (1986) (holding trial court erred in refusing to allow defendant to cross-examine witness concerning agreements he had reached in return for his testimony because the ruling "kept from the jury facts concerning bias that were central to assessing [the witness's] reliability"); *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974) (holding trial court erred in refusing to allow defendant to cross-examine key juvenile witness on fact that he

was on probation at the time he was questioned by police because right to confrontation includes ability to conduct "cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness"); *State v. Chestnut*, 621 P.2d 1228, 1232-33 (Utah 1980) (holding trial court erred in not allowing defendant to cross-examine witness concerning his "motive in testifying as he had"), *disapproved of on other grounds by State v. Crick*, 675 P.2d 527, 531 (Utah 1983). *Cf. State v. Drawn*, 791 P.2d 890, 894 (Utah App. 1990) (upholding admission of accomplices' hearsay statements even though accomplices did not testify at trial and thus were not subject to cross-examination because they had sufficient indicia of reliability).

Once that opportunity is provided, "'[i]t is within the exclusive province of the jury to judge the credibility of the witness[es] and the weight of the evidence." *State v. Hardy*, 2002 UT App 244, ¶ 11, 54 P.3d 645 (quoting *State v. Howell*, 649 P.2d 91, 97 (Utah 1982)) (first alternation in original); *see also State v. Fedorowicz*, 2002 UT 67, ¶ 40, 52 P.3d 1194 (holding that, "in reviewing the sufficiency of the evidence, [this Court] refuse[s] to 're-evaluate the credibility of witnesses or second-guess the jury's conclusion'") (citation omitted), *cert. denied*, ___ S.Ct. ___ (Jan. 13, 2003).

In this case, defendant had the opportunity to explore on cross-examination all the issues he now raises concerning Mr. Rasabout's testimony (R. 100:14-19; *see also* closing argument at R. 100:90-94). It was then within the exclusive province of the jury to decide to what extent Rasabout's testimony was credible. *Hardy*, 2002 UT App 244, at ¶ 11.

Defendant has not shown Officer Malley's eyewitness identification was unreliable. Defendant claims that the jury should not have relied on Malley's testimony because his identification of defendant was unreliable. Because defendant's claim is purely speculative, this Court should reject it.

Upon proper objection by defendant, a trial court is required "to undertake 'an in-depth appraisal'" of the reliability of an eyewitness's identification testimony before admitting such evidence. *State v. Martinez*, 2002 UT App 126, ¶ 19, 47 P.3d 115 (citation omitted). Factors relevant to that appraisal include

> (1) [T]he opportunity of the witness to view the actor during the event; (2) the witness's degree of attention to the actor at the time of the event; (3) the witness's capacity to observe the event, including his or her physical and mental acuity; (4)whether the witness's identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and (4) the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly.

Id. (quoting *State v. Ramirez*, 817 P.2d 774, 781 (Utah 1991)) (alternation in original).

Here, defendant never objected to Malley's eyewitness identification. Therefore, he waived any right to challenge the reliability of Malley's identification testimony on appeal. *See State v. Johnson,* 774 P.2d 1141, 1144 (Utah 1989) (holding general rule in criminal cases is that "'a contemporaneous objection or some form of *specific* preservation of claims of error must be made a part of the trial court record before an appellate court will review such claims on appeal'") (citation omitted).

Moreover, because defendant did not object below, the record contains no evidence concerning how long and from what distance Malley was able to view

defendant, the extent to which Malley's attention to defendant was distracted by other things, and the extent to which Malley, a twenty-seven-year veteran of the police force, was impaired by excitement, nervousness, or confusion.

Absent such evidence, defendant's suggestions that Malley's identification would not have passed muster under those factors because his "degree of attention was . . . reduced" since there were four suspects, because his "capacity to observe the driver was also limited by the excitement, nervousness, and confusion" at the scene, and because Malley suffered from "heightened nervousness and tension" are purely speculative.

Thus, defendant cannot show the officer's identification was insufficient to support defendant's conviction. *Cf. State v. Penman*, 964 P.2d 1157, 1162 (Utah App. 1998) (holding parties claiming error below and seeking appellate review have duty and responsibility to support allegations with adequate record).

As with Rasabout's testimony, defendant had the opportunity to cross-examine Malley and explore the issues he now raises concerning Malley's testimony (R. 100:31-46 *see also* closing argument at R. 100:90-91, 93). It was then within the exclusive province of the jury to decide what weight should be given that testimony. *Howell*, 649 P.2d at 97; *Hardy*, 2002 UT App 244, at ¶ 11.

Because defendant has not shown that the evidence before the jury was insufficient to support its verdict, defendant's claim fails.

CONCLUSION

Based upon the foregoing, the State respectfully requests the Court to affirm defendant's conviction.

ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

Because this case presents no complex or novel questions, the State does not request that it be set for oral argument or that a published opinion issue.

Dated this 12th day of February, 2003.

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CERTIFICATE OF MAILING

I certify that on 12 February 2003, I caused to be mailed, by U.S. Mail, postage prepaid, two accurate copies of this ***BRIEF OF APPELLEE*** to Patrick V. Lindsay and Margaret P. Lindsay, Aldrich, Nelson, Weight & Esplin, 43 East 200 North, P.O. Box "L," Provo, Utah 84603, Attorneys for Appellant.

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